

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

YOLANDA HERRERA,	)	
Petitioner	)	CIVIL ACTION NO. 05-10441-MLW
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
Respondent	)	
	)	

**Government's Motion To Substitute  
Exhibits In Support Of Its Memorandum**

The United States of America, by Michael J. Sullivan, United States Attorney, and Michael J. Pelgro, Assistant U.S. Attorney, hereby files this motion to substitute exhibits in support of its memorandum in opposition to the petitioner's motion under 28 U.S.C. § 2255. The government requests that the Court consider the three exhibits attached to this motion instead of the three exhibits attached to the government's memorandum.

In support of this motion, the government states that, on December 5, 2005, it filed its memorandum in opposition to the petitioner's motion under 28 U.S.C. § 2255. The government attached to the memorandum three exhibits from the underlying criminal case. Certain exhibits, however, did not scan properly so that only the first page of the proposed exhibit was filed. The government has re-scanned the exhibits in their entirety.

The government therefore respectfully requests that the Court allow this motion to substitute the three exhibits attached to this motion instead of the three exhibits attached to the previously-filed memorandum.

Respectfully submitted,

MICHAEL J. SULLIVAN  
United States Attorney

By: /s/Michael J. Pelgro  
Michael J. Pelgro  
Assistant U.S. Attorney

DATED: December 7, 2005.

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the person listed below a copy of the foregoing document by depositing in the United States mail a copy of same in an envelope bearing sufficient postage for delivery:

Yolanda Herrera  
Inmate No. 23564-038  
FCI Danbury  
Federal Correctional Institution  
Route 37  
Danbury, CT 06811

This 7th day of December 2005.

/s/Michael J. Pelgro  
MICHAEL J. PELGRO  
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

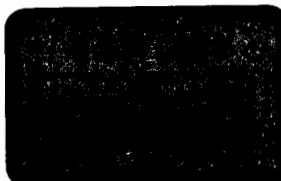
UNITED STATES OF AMERICA	)	CR 01-10056
	)	Boston, MA
v.	)	September 10, 2002
	)	
NELSON RUDY TEJEDA, ET AL	)	

BEFORE THE HONORABLE MARK L. WOLF  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

(As previously noted.)

JUDITH A. TWOMEY, RPR  
Official Court Reporter  
One Courthouse Way  
Courtroom 10~Room 5200  
Boston, MA 02210  
(617) 946-2577



## INDEX

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>RD</u>	<u>RC</u>	<u>COURT</u>
Joevanni Figueroa	94	107			
Linna Gonzalez	116	132			
Raphael Feliz Guevara	134	139			139
Awilda Osorio	140				

<u>EXHIBITS</u>	<u>MARKED</u>	<u>RECEIVED</u>
1		113
2		132
3		138

1 MR. MURPHY: I agree with the court's  
2 calculations, your Honor.

3 THE COURT: Once I make that determination,  
4 I'll calculate the Guidelines for Hector A. Arias.

5 MR. MURPHY: Thank you.

6 THE COURT: I believe -- has any agreement been  
7 reached with regard to Ms. Herrera?

8 MR. PELGRO: Yes, your Honor. The parties --  
9 the defendant has agreed to the government's figure of  
10 one to three kilograms of heroin, putting her at base  
11 offense level 32. The government is not opposing her  
12 request for a safety valve reduction.

13 Originally, the government had indicated in the  
14 plea agreement that she should get a role enhancement.  
15 However, upon reflection, the government thinks  
16 Probation has the better analysis of this and is not  
17 pressing that. The government is agreeing to no role  
18 enhancement or reduction. And the government is again  
19 dropping its obstruction objection, which brings into  
20 play the acceptance reduction.

21 So, essentially, your Honor, there are no  
22 further factual issues. It would be 32 minus 2 minus 3.

23 THE COURT: 27.

24 Mr. Budreau, have you and Ms. Herrera each read  
25 the presentence report?

1 MR. BUDREAU: Absolutely, your Honor.

2 THE COURT: More precisely, was it read to her  
3 in Spanish?

4 MR. BUDREAU: It was, your Honor, as well as  
5 the addendum.

6 THE COURT: Ms. Herrera, please stand. Was the  
7 presentence report and the objections in the back of it  
8 read to you in Spanish?

9 THE DEFENDANT: Yes.

10 THE COURT: And other than the original  
11 objections, is there anything that you saw in there that  
12 you thought was incorrect that might make a difference  
13 to sentencing?

14 THE DEFENDANT: No.

15 THE COURT: Now, I was just told that you now  
16 agree that you should be held responsible for one to  
17 three kilograms of heroin rather than 100 to 400 grams  
18 as --

19 THE DEFENDANT: Yes.

20 THE COURT: And, also, rather than the 3,146  
21 grams found by Probation, which would have raised your  
22 sentence if it was proven, you agree to one to 300, is  
23 that right -- I'm sorry, one to three kilograms -- is  
24 that correct?

25 THE DEFENDANT: Ah hah.

1 THE COURT: You have to say yes or no.

2 THE DEFENDANT: Yes.

3 THE COURT: Did you discuss with Mr. Budreau  
4 whether you wanted to make that agreement and give up  
5 your objection claiming one to 400 grams?

6 THE DEFENDANT: Yes.

7 THE COURT: Are you fully satisfied with his  
8 work as your lawyer in this case?

9 THE DEFENDANT: Yes.

10 THE COURT: Once again, I'm going to accept  
11 that agreement. I think there is, from what I saw,  
12 overwhelming evidence that there's at least one to three  
13 kilograms involved. The real question is whether the  
14 defendant would be held responsible for more than three  
15 kilograms as recommended by Probation. But it's only  
16 another 146 or 147 grams. Some reasonable  
17 approximations are permissible. This was the result of  
18 reasonable arm's length negotiations, and I will accept  
19 -- I will accept that.

20 The Guidelines then, I believe, as Mr. Pelgro  
21 just said, give us a total offense level of 27, which  
22 means the range of imprisonment is 70 to 87 months,  
23 because the criminal history category is 1.

24 I guess we have the same issue of whether it's  
25 36 or 60 months supervised release.

1                   What is the fine range? I'll ask Probation  
2                   officer to identify herself for the record.

3                   FROM THE FLOOR: Jennifer Sinclair. 12,500 to  
4                   one million at a level 27.

5                   THE COURT: 12,500 to one million is the fine  
6                   range, and a \$100 special assessment.

7                   Do counsel agree that those are the Guideline  
8                   ranges?

9                   MR. PELGRO: Yes, your Honor.

10                  MR. BUDREAU: Yes, your Honor.

11                  THE COURT: You may be seated.

12                  MR. BUDREAU: Thank you, your Honor.

13                  THE COURT: Has any agreement been reached with  
14                  regard to Ms. Gonzalez? Actually, maybe we ought to  
15                  wait until Mr. Dilday arrives.

16                  MR. PELGRO: I was just going to say that it's  
17                  pretty much as set forth in the chart. There weren't  
18                  any disagreements.

19                  THE COURT: There were no disagreements?

20                  MR. PELGRO: There's just one issue, your  
21                  Honor, that relates to the safety valve. As indicated  
22                  earlier, the government believes that Ms. Gonzalez has  
23                  met the fifth criterion of the proffer. However, there  
24                  is an issue concerning criminal history as to whether or  
25                  not she has more than one point, and that's all stated

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS


UNITED STATES OF AMERICA                    ) CR 01-10056  
  ) Boston, MA  
v.   ) September 11, 2002  
  )  
NELSON RUDY TEJEDA, ET AL                 )

BEFORE THE HONORABLE MARK L. WOLF  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

(As previously noted.)

JUDITH A. TWOMEY, RPR  
Official Court Reporter  
One Courthouse Way  
Courtroom 10~Room 5200  
Boston, MA 02210  
(617)946-2577



INDEX

<u>WITNESS</u>	<u>DIRECT CROSS</u>	<u>RD</u>	<u>RC</u>	<u>COURT</u>
----------------	---------------------	-----------	-----------	--------------

Jose Cruz	58			
-----------	----	--	--	--

<u>EXHIBITS</u>	<u>MARKED</u>	<u>RECEIVED</u>
-----------------	---------------	-----------------

13		30
14		33

1       there and tell everybody what a miserable experience you  
2       had, maybe the rest of your life will be happier than  
3       your life to date.

4               If you don't learn anything from this,  
5       including there are times when it doesn't make sense to  
6       obey your parents when they're encouraging you to break  
7       the law, you're going to spend the rest of your life in  
8       prison.

9               You may be seated.

10              Next we go to Ms. Herrera.

11              If I understand it correctly, there are no  
12       remaining disputes concerning Ms. Herrera. The parties  
13       are in agreement, and I've accepted the agreement that  
14       this involves one to three kilograms of cocaine. Safety  
15       valve has been satisfied. The government has withdrawn  
16       its objection concerning obstruction of justice, and  
17       there's a three level reduction for acceptance of  
18       responsibility.

19              MR. PELGRO: That's correct, your Honor.  
20       However, I think you said cocaine.

21              THE COURT: I'm sorry, I meant heroin.

22              MR. PELGRO: That's correct.

23              THE COURT: Let's look at the objections so I  
24       can make the proper endorsements.

25              The first objection is accommodated in the plea

1 agreement concerning acceptance of responsibility.

2 The second objection regarding weight, the  
3 government says should be 1,000 to 3,000 grams. That's  
4 allowed.

5 The third objection is taken care of by the  
6 earlier rulings. So is the fourth, I believe.

7 Is that all correct, Mr. Pelgro?

8 MR. PELGRO: Yes, your Honor.

9 THE COURT: With regard to the first of the  
10 defendant's objections, am I correct, Mr. Budreau, that  
11 the defendant now agrees, as I was told previously, that  
12 the proper amount is one to 3,000 grams.

13 MR. BUDREAU: That's correct, your Honor. I  
14 think page 9 is the second objection.

15 THE COURT: Objection 2, with the agreement of  
16 the government, is allowed. That relates to  
17 obstruction.

18 MR. BUDREAU: Page 12 is the third objection.

19 THE COURT: The third objection concerning  
20 acceptance of responsibility is also allowed.

21 Objection 4, I think, requires a ruling, is  
22 that right?

23 MR. BUDREAU: Correct.

24 THE COURT: Objection 5, I think, requires no  
25 ruling.

1 And 6 appears to be the same, is that right?

2 MR. BUDREAU: That's right, your Honor.

3 THE COURT: All right. In view of all of that,  
4 as I understand it, the total offense level is 27,  
5 criminal history category is 1, Guidelines are 70 to 87  
6 months, 60 months supervised release, a fine range of  
7 12,500 to \$1 million, and a \$100 special assessment.

8 Do the parties agree?

9 MR. BUDREAU: Yes, we do.

10 MR. PELGRO: Yes, your Honor.

11 THE COURT: What is the government's  
12 recommendation and what are the reasons for it?

13 MR. PELGRO: Your Honor, the government is  
14 recommending a sentence of 87 months incarceration, five  
15 years supervised release, and I'll leave the issue of  
16 the fine to the court's discretion, and a special  
17 assessment.

18 The reason, your Honor, is as follows. This  
19 defendant, although not as out front as her -- as the  
20 two men in her life, played a vitally important role to  
21 the success of the conspiracy, and I would point your  
22 Honor's attention to two groups of evidence. The  
23 wiretap evidence really is what made the case against  
24 this particular defendant, and what it showed was daily  
25 contact between Ms. Herrera and Mr. Hector B. Arias and

1 Ms. Herrera and Hector A. Arias. In fact, she was often  
2 the intermediary between those two strong-willed  
3 persons. But what her job really was, as Linna Gonzalez  
4 testified, was keeping track of how much product they  
5 had on hand, how much they had mixed this to make the  
6 distributor quantities of heroin, how much money they  
7 had on hand, and how much they were going to need to pay  
8 the supplier for the next quantity of heroin.

9 That came through loud and clear on the wiretap  
10 evidence, as set forth in the presentence report, that  
11 she was the person who was the bookkeeper, if you will,  
12 the financial recordkeeper, the person that made sure  
13 this was a profitable venture, and they weren't losing  
14 money instead of making money.

15 Again, the only other piece of evidence, your  
16 Honor, would be Ms. Gonzalez's testimony that in  
17 addition to that she -- in addition to those roles --  
18 and Mrs. Gonzalez testified that Ms. Herrera was the  
19 person who would keep track of everything in notebooks,  
20 would issue out the money, make sure everyone was  
21 getting the correct money, but she would -- she was also  
22 the person who would help in preparing the heroin for  
23 distribution. She would bag it. She would get some of  
24 the things needed to bag the heroin.

25 So, to the government's way of thinking, that

1 was a vitally important role to the success of the  
2 conspiracy.

3 I would add, your Honor, like the other persons  
4 in this conspiracy, she has no drug issues. She's not a  
5 heroin addict. This is purely a profit venture for her.

6 She entered the country illegally. She was  
7 living in section 8 housing. She allowed her husband to  
8 live there illegally. She was using a fake ID, fake  
9 Social Security number. All of those things, your  
10 Honor, with regard to the other defendants, equally  
11 apply to this defendant. And, essentially, that would  
12 be the reason, your Honor.

13 MR. BUDREAU: Your Honor, James Budreau on  
14 behalf of Ms. Herrera. Ms. Herrera did come to the  
15 country in 1991. Prior to that, she lived in the  
16 Dominican Republic, like her husband, but she had lived  
17 in pretty much what we would call abject poverty. She  
18 had lost her family home, as well as some properties, as  
19 a result of her brother, who had lost some money in some  
20 situation. But she lived in abject poverty. She had  
21 three children -- has three children in the Dominican  
22 Republic. She's 47 years old. She lived in  
23 Massachusetts. She did work while she was in  
24 Massachusetts. She worked as a seamstress, and she  
25 worked for a flower factory. She's a person who did put

1 her hands to the grindstone in that respect in  
2 Massachusetts while she was here. She did get involved.  
3 She obviously has accepted responsibility for that.

4 I think the evidence, to some degree,  
5 demonstrates the control that her husband had over the  
6 family and that she is also one of those people. She  
7 accepts complete responsibility for what she did, as Mr.  
8 Pelgro outlined. But I do think that it's pretty  
9 evident, this was not a house of feminism. This is a  
10 house where Boogie ruled the ruse. She was a cog in the  
11 machine. No question about it, she did some awful  
12 things, no question about it.

13 I think there's one thing that distinguishes  
14 her from the rest of the family beyond the evidence that  
15 we have discussed and, that is, she did do a safety  
16 valve proffer, and I think that's important for a couple  
17 of reasons. One is she stood up and said, I did wrong,  
18 and this is what I did. And she's a person who had the  
19 force to point the finger at her common law husband and  
20 say things about him, as well as her son. Those are  
21 tremendously difficult things for anybody to do,  
22 especially since she had been in the shadow of her  
23 common law husband and, as the report shows, the PSR  
24 shows, he was a relatively abusive person, not only to  
25 her son, but to her. And while she didn't cower in the

1 corner, and this is not one of any PTSD or anything like  
2 that, it does demonstrate that this man had a lot of  
3 power over her. When she was out of the shadow, she  
4 stood up and said, I take responsibility, and said, this  
5 is what everybody did in this organization. While she  
6 didn't testify against anyone, that still does not mean  
7 she didn't take that sort of step and didn't take  
8 herself out of the shadow of her husband. It shows  
9 she's going to change her ways and be a different person  
10 when she is released and goes back to her children in  
11 the Dominican Republic.

12 I would ask the court to consider all that and  
13 ask the court to give her a sentence at the low end of  
14 the Guidelines, which would be 70 months.

15 Thank you.

16 THE COURT: Ms. Herrera, you have an  
17 opportunity to speak before I decide what sentence to  
18 impose. You do not have to say anything if you don't  
19 want to. But if there's anything you would like to say,  
20 this is the time.

21 THE DEFENDANT: First of all, I want to  
22 apologize to you and to the government of the United  
23 States and to God. I have already asked God for  
24 forgiveness, because I am sorry. And that's all. Thank  
25 you.

1 (Short pause.)

2 THE COURT: Ms. Herrera, please stand.

3 In connection with the one count to which  
4 you've pled guilty, I hereby sentence you to serve 87  
5 months in the custody of the Attorney General of the  
6 United States, to be followed by 60 months of supervised  
7 release on the standard conditions and on the additional  
8 conditions that you pay a hundred thousand dollar fine,  
9 that you not possess a firearm or other dangerous  
10 weapon, and that if ordered deported you leave  
11 immediately and not return without the authorization of  
12 the Attorney General.

13 You have a limited right to appeal. You gave  
14 up some of your rights to appeal in your presentence  
15 report. I believe you still retain whatever rights you  
16 would ordinarily -- well, you have the right to appeal  
17 in the plea agreement. You may have given up your right  
18 to appeal the decisions I've made. But, in any event,  
19 if you want to appeal, you should assume you have the  
20 right to appeal. Notice of appeal has to be filed  
21 within ten days of the entry of judgment. If you'd like  
22 to try to pursue an appeal within the limits left to you  
23 by the plea agreement, but do not have the money to  
24 afford a lawyer, one will be appointed for you at public  
25 expense.

1 Fundamentally, the reasons for this decision  
2 are as follows. 87 months is at the high end of what is  
3 said to be the reasonable range, but nobody asked that  
4 you get an upward adjustment like your common law  
5 husband and your son for your role in the offense and,  
6 if I had been asked, I might have granted it, because  
7 you played a management role in this scheme.

8 You bear a responsibility to your son being  
9 here and -- some responsibility for your son being here,  
10 for Ms. Gonzalez being here, for everybody else being  
11 here. And it is good that you made that safety valve  
12 proffer, but you got a two level reduction in your  
13 Guidelines for doing that.

14 But, fundamentally, you know, you're a person  
15 like Boogie who was able to do honest work in the  
16 Dominican Republic and here. You are a seamstress. You  
17 worked in a flower shop. But you decided or at least  
18 agreed to do heroin instead. And it has a horrible  
19 effect on people. If you didn't know that before, you  
20 certainly should understand it, having sat here the last  
21 three days. And, you know, you came to this country  
22 illegally. You were given subsidized housing, paid for  
23 in part by the government of the United States. And  
24 instead of taking advantage of the opportunity you  
25 legally obtained to do honest work, you did dishonest,

1 dangerous work.

2 Now you have -- frankly, the way the sentencing  
3 laws work at the moment, I don't have the power to give  
4 you a sentence that's as high as Andy's, but it's hard  
5 for me to explain why you're not going to prison at  
6 least as long as him. But you're not.

7 So you're likely to be the first one sent back  
8 to the Dominican Republic. And if this has been a  
9 miserable experience for you, I hope you'll tell  
10 everybody you meet so they won't be tempted to come  
11 here, try to do the same thing, and have the same  
12 miserable experience.

13 You may be seated.

14 MR. BUDREAU: Your Honor, if I might ask, I  
15 don't know if it's an appropriate request for counsel  
16 for the Ariases to leave at this point. If it's not,  
17 certainly, we'll --

18 THE COURT: We're going to break for lunch  
19 shortly.

20 MR. BUDREAU: Fine, your Honor.

21 THE COURT: That's one of the issues we'll have  
22 to discuss.

23 Who is it -- Mr. Cullen made arrangements not  
24 to have to be anyplace else this afternoon. Who else?

25 MR. PALMER: Attorney Palmer for Mr. Ortiz. I

# MANDATE

10056  
USDC, MA  
Wolfe, J.

## United States Court of Appeals For the First Circuit

No. 02-2298

UNITED STATES,

Appellee,

v.

YOLANDA HERRERA,

Defendant, Appellant.

Before

Boudin, Chief Judge,  
Lipez and Howard, Circuit Judges.

### JUDGMENT

Entered: May 27, 2004

We review for plain error, in light of appellant's concession that she did not object below to the fine imposed by the district court.

Appellant has addressed only one of the four components of the plain error test. See United States v. Rowe, 268 F.3d 34, 38 (1st Cir. 2001). Our review of the record below shows that it is adequate for appellate review and that there is no plain error. See United States v. Lujan, 324 F.3d 27, 35 (1st Cir. 2003).

The judgment is affirmed. 1st Cir. R. 27(c).

**Certified and Issued as Mandate  
under Fed. R. App. P. 41.**

Richard Cushing Donovan, Clerk

*Janet M. Viles*  
Deputy Clerk

Date: 6/17/04

By the Court:

Richard Cushing Donovan, Clerk.

By: **JULIE GREGG**

Appeals Attorney

[cc: Dina Chaitowitz, AUSA, Virginia Vander Jagt, AUSA,  
Darla Jean Mondou, Esq.]